

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING WIRELESS
COMMUNICATION DEVICES,
PORTABLE MUSIC AND DATA
PROCESSING DEVICES, AND TABLET
COMPUTERS**

Inv. No. 337-TA-794

**NOTICE OF THE COMMISSION'S FINAL DETERMINATION FINDING A
VIOLATION OF SECTION 337; ISSUANCE OF A LIMITED EXCLUSION ORDER
AND A CEASE AND DESIST ORDER; TERMINATION OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has found a violation of section 337 in this investigation and has issued a limited exclusion order prohibiting respondent Apple Inc. of Cupertino, California ("Apple"), from importing wireless communication devices, portable music and data processing devices, and tablet computers that infringe claims 75-76 and 82-84 of U.S. Patent No. 7,706,348 ("the '348 patent"). The Commission has also issued a cease and desist order against Apple prohibiting the sale and distribution within the United States of articles that infringe claims 75-76 and 82-84 of the '348 patent. The Commission has found no violation based on U.S. Patent Nos. 7,486,644 ("the '644 patent"), 7,450,114 ("the '114 patent"), and 6,771,980 ("the '980 patent"). The Commission's determination is final, and the investigation is terminated.

FOR FURTHER INFORMATION: Clark S. Cheney, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2661. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 1, 2011, based on a complaint filed by Samsung Electronics Co., Ltd. of Korea and Samsung Telecommunications America, LLC of Richardson, Texas (collectively, "Samsung").

76 *Fed. Reg.* 45860 (Aug. 1, 2011). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers, by reason of infringement of various U.S. patents. The notice of investigation names Apple as the only respondent. The patents remaining in the investigation are the '348, '644, '114, and '980 patents. The complaint also alleged infringement of U.S. Patent No. 6,879,843, but the investigation with respect to that patent was previously terminated based on withdrawn allegations.

On September 14, 2012, the presiding administrative law judge ("ALJ") issued his final initial determination ("ID") finding no violation of section 337 based on the four patents remaining at issue. The ALJ determined that the '348, '644, and '980 patents are valid but not infringed and that the '114 patent is both invalid and not infringed. The ALJ further determined that the economic prong of the domestic industry requirement was satisfied with respect to the remaining asserted patents, but that the technical prong was not satisfied for any of those patents.

On October 1, 2012, complainant Samsung and the Commission investigative attorney ("IA") filed petitions for review of the ID, while Apple filed a contingent petition for review.

On November 19, 2012, the Commission determined to review the ID in its entirety. 77 *Fed. Reg.* 70464 (Nov. 26, 2012). The Commission issued a public notice requesting written submissions from the parties and the public on various topics, many of which concerned the Commission's authority to issue a remedy for the importation of articles that infringe patents that the patent owner has stated it will license on fair, reasonable, and non-discriminatory ("FRAND") terms. Other topics concerned patent issues specific to this investigation. The Commission received written submissions from Samsung, Apple, and the IA addressing all of the Commission's questions. In response to the FRAND-related topics posed to the public, the Commission received responses from the following: Association for Competitive Technology; Business Software Alliance; Ericsson Inc.; GTW Associates; Hewlett Packard Company; Innovation Alliance; Intel Corporation; Motorola Mobility LLC; Qualcomm Incorporated; Research In Motion Corporation; and Sprint Spectrum, L.P.

On March 13, 2013, the Commission issued another public notice requesting written submissions from the parties and the public on various additional topics, including some FRAND-related topics. 78 *Fed. Reg.* 16865 (March 19, 2013). The Commission received written submissions from Samsung, Apple, and the IA addressing all of the Commission's questions. In response to the FRAND-related topics posed to the public, the Commission received responses from the following: Association for Competitive Technology; Business Software Alliance; Cisco Systems, Inc.; Hewlett Packard Company; Innovation Alliance; Micron Technology, Inc.; and Retail Industry Leaders Association.

Having examined the record of this investigation, including the ALJ's final ID and submissions from the parties and from the public, the Commission has determined that Samsung has proven a violation of section 337 based on articles that infringe claims 75-76 and 82-84 of the '348 patent. The Commission has determined to modify the ALJ's construction of certain terms in the asserted claims of the '348 patent, including "controller," "10 bit TFCI

information,” and “puncturing.” Under the modified constructions, the Commission has determined that Samsung has proven that the accused iPhone 4 (AT&T models); iPhone 3GS (AT&T models); iPhone 3 (AT&T models); iPad 3G (AT&T models); and iPad 2 3G (AT&T models) infringe the asserted claims of the ’348 patent. The Commission has further determined that the properly construed claims have not been proven by Apple to be invalid and that Samsung has proven that a domestic industry exists in the United States with respect to the ’348 patent. The Commission has determined that Apple failed to prove an affirmative defense based on Samsung’s FRAND declarations.

The Commission has determined that Samsung has not proven a violation based on alleged infringement of the ’644, ’980, and ’114 patents. With some modifications to the ALJ’s analysis, the Commission has determined that the asserted claims of the ’644 and ’980 patents are valid but not infringed and that the asserted claims of the ’114 patent are not infringed and are invalid. The Commission has further determined that Samsung did not prove a domestic industry exists in the United States relating to articles protected by the ’644, ’980, and ’114 patents.

The Commission has determined that the appropriate remedy is a limited exclusion order and a cease and desist order prohibiting Apple from importing into the United States or selling or distributing within the United States wireless communication devices, portable music and data processing devices, and tablet computers that infringe claims 75-76 and 82-84 of the ’348 patent. The Commission has determined that the public interest factors enumerated in section 337(d)(1) and (f)(1) do not preclude issuance of the limited exclusion order and cease and desist order. The Commission has determined that Samsung’s FRAND declarations do not preclude that remedy.

Finally, the Commission has determined that a bond in the amount of zero percent of the entered value is required to permit temporary importation during the period of Presidential review (19 U.S.C. § 1337(j)) of wireless communication devices, portable music and data processing devices, and tablet computers that are subject to the order. The Commission’s order and opinion were delivered to the President and to the United States Trade Representative on the day of their issuance.

Commissioner Pinkert dissents on public interest grounds from the determination to issue an exclusion order and cease and desist order.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton
Acting Secretary to the Commission

Issued: June 4, 2013

**UNITED STATES INTERNATIONAL TRADE COMMISSION
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In the Matter of

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LIMITED EXCLUSION ORDER

The Commission has determined that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the unlawful importation, sale for importation, and sale after importation by Respondent Apple, Inc. of certain electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers covered by one or more of claims 75-76 and 82-84 of United States Patent No. 7,706,348 (“the ’348 patent”).

Having reviewed the record of this investigation, including the written submissions of the parties and the public, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of infringing electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers, manufactured for or on behalf of Respondent or any of its affiliated companies, parents, subsidiaries, licensees, or other related business entities, or their successors or assigns.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude the issuance of the limited exclusion order, and that the Respondent may import without posting bond during the Presidential review period.

Accordingly, the Commission hereby **ORDERS** that:

1. Electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers, covered by one or more of claims 75-76 and 82-84 of the '348 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Respondent or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law, and except for refurbished articles imported on or before June 3, 2015, for use as a replacement for an identical article that was imported prior to the date of this order.
2. Notwithstanding paragraph 1 of this Order, the aforesaid electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption without posting bond, pursuant to subsection (j) of Section 337 (19 U.S.C. § 1337(j)) and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43,251), from the day after this Order is received by the United States Trade Representative until such time as the United

States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than sixty days after the date of receipt of this Order.

3. At the discretion of U.S. Customs and Border Protection (“CBP”) and pursuant to procedures that it establishes, persons seeking to import electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers, that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.
4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers, imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.
5. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission’s Rules of Practice and Procedure (19 C.F.R. § 210.76).

6. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and CBP.
7. Notice of this Order shall be published in the *Federal Register*.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton'.

Lisa R. Barton
Acting Secretary to the Commission

Issued: June 4, 2013

**UNITED STATES INTERNATIONAL TRADE COMMISSION
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CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Apple Inc., 1 Infinite Loop, Cupertino, CA 95014, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, transferring (except for exportation), and soliciting U.S. agents or distributors for, electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers, covered by one or more of claims 75-76 and 83-84 of United States Patent No. 7,706,348 (“the ’348 patent”) in violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

**I.
Definitions**

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainants” shall mean Samsung Electronics Co., Ltd. (“SEC”), of Seoul, South Korea; and Samsung Telecommunications America, LLC (“STA”), of Richardson, Texas.

- (C) “Respondent” shall mean Apple Inc., 1 Infinite Loop, Cupertino, CA 95014.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term “covered products” shall mean electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers, covered by one or more of claims 75-76 and 82-84 of the ’348 patent. Covered products shall not include articles for which a provision of law or license avoids liability for infringement of claims 75-76 and 82-84 of the ’348 patent.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

For the remaining term of the ’348 patent, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, Respondent shall be permitted:

- (A) on or before June 3, 2015, to distribute refurbished covered articles for use as a replacement for an identical covered article that was imported prior to the date of this order;
- (B) to engage in specific conduct otherwise prohibited by the terms of this Order if, in a written instrument, the owner of the '348 patent licenses or authorizes such specific conduct; or
- (C) to engage in specific conduct otherwise prohibited by the terms of this Order if such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on February 1 of each year and shall end on the subsequent January 31. The first report required under this section shall cover the period from the date of issuance of this order through January 31, 2014.

This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period. When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-794") in a prominent place on the cover pages and/or the first page. (*See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainants' counsel.¹

¹ Complainants must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this order. The designated attorney must be on the protective order entered in the investigation.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

**VI.
Record-Keeping and Inspection**

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

**VII.
Service of Cease and Desist Order**

Respondent is ordered and directed to:

- (A) Serve, within fifteen days after the effective date of this order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and

employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

- (B) Serve, within fifteen days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the order upon each successor; and
- (C) Maintain such records as will show the name, title, and address of each person upon whom the order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the '348 patent expires.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

**X.
Modification**

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

**XI.
Bonding**

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), without Respondent posting a bond.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton
Acting Secretary to the Commission

Issued: June 4, 2013

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PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon, the Commission Investigative Attorney, Lisa Murray, Esq., and the following parties as indicated on **June 4, 2013**.



Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Samsung Electronics., Ltd.
and Samsung Telecommunications America, LLC:**

S. Alex Lasher, Esq.

QUINN EMANUEL URQUHART & SULLIVAN LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004

() Via Hand Delivery
(☒) Via Overnight Delivery
() Via First Class Mail
() Other: _____

On Behalf of Respondent Apple Inc.:

Nina S. Tallon, Esq.

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LLP**
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() Via Hand Delivery
(☒) Via Overnight Delivery
() Via First Class Mail
() Other: _____